No. 07-547

In the Supreme Court of the United States

OSCAR LOPEZ, PETITIONER

v.

MICHAEL J. ASTRUE, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the district court did not abuse its discretion under the Equal Access to Justice Act, 28 U.S.C. 2412(d), in awarding an attorney's fee of $140 per hour based on the cost of living in Abilene, Texas, instead of a higher rate based on the national Consumer Price Index for All Urban Consumers.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 4
Conclusion 13

TABLE OF AUTHORITIES

Cases:

Baker v. *Bowen*, 839 F.2d 1075 (5th Cir. 1988) 3, 6, 7
Blum v. *Stenson*, 465 U.S. 886 (1984) 7
Commissioner, INS v. *Jean*, 496 U.S. 154 (1990) 7, 8
Cox Constr. Co. v. *United States*, 17 Cl. Ct. 29 (1989) 8
Dewalt v. *Sullivan*, 963 F.2d 27 (3d Cir. 1992) 8, 9
Hall v. *Shalala*, 50 F.3d 367 (5th Cir. 1995) 5
Hickey v. *Secretary of HHS*, 923 F.2d 585 (8th Cir. 1991) 11
Johnson v. *Sullivan*, 919 F.2d 503 (8th Cir. 1990) 11, 12
Sakamoto v. *Duty Free Shoppers, Ltd.*, 764 F.2d 1285 (9th Cir. 1985), cert. denied, 475 U.S. 1081 (1986) 11
Sorenson v. *Mink*, 239 F.3d 1140 (9th Cir. 2001) 10, 11
Sullivan v. *Sullivan*, 958 F.2d 574 (4th Cir. 1992) 9, 10
Thangaraja v. *Gonzales*, 428 F.3d 870 (9th Cir. 2005) ... 10
Yoes v. *Barnhart*, 467 F.3d 426 (5th Cir. 2006) 3, 4, 12

Statutes: Page

Equal Access to Justice Act, 28 U.S.C. 2412:
28 U.S.C. 2412(d) 2
28 U.S.C. 2412(d)(1)(A) 2
28 U.S.C. 2412(d)(2)(A) 2, 5, 6
28 U.S.C. 2412(d)(2)(A)(ii) 2, 6
28 U.S.C. 124(a) 3
28 U.S.C. 1295(a)(3) 8
38 U.S.C. 7292 (2000 & Supp. V 2005) 8
42 U.S.C. 1988 7

Miscellaneous:

H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. (1980) 6
H.R. Rep. No. 1418, 96th Cong., 2d Sess. (1980) 6
S. Rep. No. 974, 96th Cong., 2d Sess. (1980) 6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the *Federal Reporter* but is reprinted in 236 Fed. Appx. 106. The opinion of the district court (Pet. App. B1-B3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2007. The petition for a writ of certiorari was filed on October 22, 2007 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner sued the Commissioner of Social Security (Commissioner) in the Abilene Division of the United States District Court for the Northern District

of Texas. He won a remand in his action for disability benefits, and subsequently filed an application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d). Pet. App. D1. EAJA authorizes a court to award "fees and other expenses" to a party who prevails in litigation against the United States. 28 U.S.C. 2412(d)(1)(A). The statute defines "fees and other expenses" to include, *inter alia*, "reasonable attorney fees." 28 U.S.C. 2412(d)(2)(A).

The statute further prescribes two criteria for determining the reasonableness of attorney's fees. First, all fees must be "based upon prevailing market rates for the kind and quality of the services furnished." 28 U.S.C. 2412(d)(2)(A). Second, "attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. 2412(d)(2)(A)(ii).

In his motion, petitioner sought attorney's fees at a rate of $156.25 per hour. Pet. App. D2. Although that rate exceeded EAJA's statutory cap of $125 per hour, he asserted that the higher rate should be awarded to reflect an increase in the national cost of living since EAJA's reenactment in 1996. *Id.* at D3. Petitioner sought to recover at this rate for 59.6 hours of attorney time, plus additional court costs of $250, which would have totaled $9562.50. See *id.* at D6, D8. The Commissioner did not dispute petitioner's entitlement to fees and costs, but objected to the amount. *Id.* at D2.

2. The magistrate judge approved an hourly rate of $140. The court agreed that the rise in the cost of living since 1996 justified an hourly rate above the $125 statutory maximum; justified a higher rate than the court had

previously awarded; and indeed, might even justify a rate above $140, even in the Abilene and San Angelo Divisions where the magistrate judge sits. Pet. App. D5-D6. The court further recognized that the Fifth Circuit had held in *Baker* v. *Bowen*, 839 F.2d 1075 (1988), that cost-of-living adjustments to EAJA's cap should be uniform within the Dallas Division of the Northern District of Texas. Pet. App. D4. The court explained, however, that *Baker* did not require uniform cost-of-living adjustments throughout the Northern District of Texas. *Ibid.* (The Northern District comprises seven divisions and 100 counties, extending from the Panhandle counties bordering Oklahoma to Crockett County, a few miles from the Mexican border. See 28 U.S.C. 124(a) (delineating the Northern District). Instead, the court exercised its discretion to select a "reasonable" rate that was sufficient "to ensure an adequate source of representation in this court." Pet. App. D4, D5. That rate was $140 per hour. *Id.* at D5-D6. The court held that petitioner could recover at that rate for 59.45 hours of attorney time, plus court costs, for a total award of $8573.00. *Id.* at D10. Applying the lower rate reduced petitioner's award by about $966.

3. Petitioner sought reconsideration, arguing for the application of a uniform cost-of-living standard. Pet. App. C2. The magistrate judge again declined, noting that the Fifth Circuit had recently rejected the notion of "rate uniformity across the entire federal district" and affirmed an award of $132.50 per hour (lower than the going rate in Dallas) in a case from the San Angelo Division. *Ibid.* (quoting *Yoes* v. *Barnhart*, 467 F.3d 426, 427 (5th Cir. 2006) (per curiam)). And the court reiterated that its award of $140 per hour in this case was sup-

ported by the court's own knowledge of the appropriate rate in the Abilene Division. *Id.* at C3.

4. The district court affirmed the magistrate judge's award and overruled petitioner's objection that "the appropriate hourly fee is the same fee applicable to the Dallas Division." Pet. App. B2. The district judge (who had also issued the fee award affirmed in *Yoes*) reiterated that the magistrate judge's award was reasonable, adequate, and consistent with the applicable law. *Id.* at B2-B3 & n.1.

5. The Fifth Circuit affirmed in an unpublished, per curiam disposition. The court of appeals rejected the argument that EAJA requires cost-of-living increases to be uniform nationally and confirmed that "rate uniformity is not required even across a single district," because "'[r]ate disparit[y] between courts serving two different markets is more than reasonable.'" Pet. App. A2 (quoting *Yoes*, 467 F.3d at 427). Reviewing for abuse of discretion, the court of appeals held that $140 per hour "adequately provide[d] for representation in Abilene." *Ibid.*

ARGUMENT

The court of appeals correctly concluded that the district court did not abuse its discretion by awarding attorney's fees at a locally appropriate rate of $140 per hour—an amount in excess of the presumptive statutory maximum of $125 per hour—rather than at a higher rate based on a particular index of the national cost of living. The Fifth Circuit's unpublished decision does not conflict with that of any other court of appeals. No federal appellate court has held that EAJA *requires* the use of petitioner's preferred economic statistics. Further review is not warranted.

1. Petitioner commits a threshold error by assuming that the amount of the fee award in this case turns only on the cost-of-living adjustment to EAJA's maximum hourly rate. The magistrate judge acknowledged that "the rise in the cost of living may justify an adjustment to the statutory attorney's fee *cap* above $140.00 per hour." Pet. App. D6 (emphasis added). But the magistrate judge found, and the district court agreed, that securing effective representation in the Abilene and San Angelo Divisions does not require paying the full amount of the inflation-adjusted cap. The amount of the cap is completely irrelevant when the "prevailing market rates for the kind and quality of the services furnished" are below the (adjusted) cap. 28 U.S.C. 2412(d)(2)(A). That is the case here: the magistrate judge adjusted the cap upward to account for the cost of living, but used his discretion to "determine that a fee based on a rate below the adjusted statutory cap 'is * * * reasonable.'" Pet. App. D5 (quoting *Hall* v. *Shalala*, 50 F.3d 367, 370 (5th Cir. 1995)).

The court of appeals properly affirmed that exercise of discretion. Petitioner asserts (Pet. 10) that the district court offered an inadequate "fact-based rationale" and that the "cost-of-living evidence in the record" does not support the fee award. These fact-bound contentions are incorrect and, in any event, do not warrant this Court's review.

2. Even if the question framed by the petition were properly presented, EAJA does not mandate the application of the same cost-of-living measurement in every division and every case and, instead, grants district courts discretion to make cost-of-living adjustments based on local factors. Petitioner asserts (Pet. 6-7) that EAJA's "plain meaning" requires courts to employ one

particular nationwide measure of the cost of living, the national Consumer Price Index for All Urban Consumers (CPI-U). That is incorrect. EAJA merely permits "the court" to determine whether "an increase in the cost of living * * * justifies a higher fee" in a particular case. 28 U.S.C. 2412(d)(2)(A)(ii). Nor is there any suggestion in EAJA's legislative history that cost of living must be measured in only one way. See generally H.R. Rep. No. 1418, 96th Cong., 2d Sess. (1980); S. Rep. No. 974, 96th Cong., 2d Sess. (1980); H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. (1980).

The Fifth Circuit's approach is entirely compatible with the statute's plain meaning. The court of appeals has directed that "[e]xcept in unusual circumstances, * * * if there is a significant difference in the cost of living since [EAJA's enactment] in a particular locale that would justify an increase in the fee, then an increase should be granted." *Baker* v. *Bowen*, 839 F.2d 1075, 1084 (5th Cir. 1988). And here the district court followed *Baker* and granted an attorney's fee higher than the statutory cap of $125 per hour, based in part on the increased cost of living. Pet. App. D4-D6. The Fifth Circuit and the district court have merely recognized that the cost of living often increases at different rates in different areas, and that the bar of Abilene is not invariably entitled to receive higher rates because of an increase in the price of goods in Dallas, or Detroit.

That approach is also consistent with the structure and purpose of EAJA. Indeed, the statute requires the court to make other fee determinations based on local (not national) conditions, including the "prevailing market rates for the kind and quality of the services furnished." 28 U.S.C. 2412(d)(2)(A). That local approach accords with this Court's treatment of fee awards under

42 U.S.C. 1988, under which a reasonable attorney's fee is "calculated according to the prevailing market rates *in the relevant community*." *Blum* v. *Stenson*, 465 U.S. 886, 895 (1984) (emphasis added).

3. Petitioner argues (Pet. 8-11) that the court of appeals' approach is incompatible with EAJA, as interpreted by this Court in *Commissioner, INS* v. *Jean*, 496 U.S. 154 (1990). According to petitioner, *Jean* stands for the proposition that EAJA's *only* "true purpose" is to encourage and enable parties to bring lawsuits against the government to challenge policies, regulations, or rulings, without regard to safeguarding the public fisc. This contention is both irrelevant and mistaken.

First, petitioner ascribes unjustified significance to the court of appeals' reference in *Baker* to the dual purposes of EAJA and its fee limitation. See 839 F.2d at 1093. In *Baker* the court of appeals simply held that although Congress has imposed a general cap on fee awards (to protect the public fisc), increases in the cost of living are one proper basis for awarding fees that exceed that cap. *Ibid.* And the court of appeals went on to award fees above the EAJA cap, just as in this case.

Second, in *Jean* the "narrow" issue before the Court was whether the plaintiff was entitled to a fee award *at all* for his attorney's work preparing fee applications, not what the maximum amount of such a "fees for fees" award would be. 496 U.S. at 154, 156 (explaining that the question presented "affect[ed] only [a claimant's] *eligibility* for compensation for services rendered for fee litigation *rather than the amount* that may be appropriately awarded for such services") (emphases added). To the very limited extent *Jean* addressed the size of awards, it simply emphasized that "a district court will

always retain substantial discretion in fixing the amount of an EAJA award." *Id.* at 163.

Accordingly, the Fifth Circuit's brief reference in *Baker* to EAJA's purposes creates no conflict with *Jean* or any other decision of this Court.

4. Petitioner asserts that the court of appeals' decision warrants review because it is in "direct conflict" with approaches taken by the Third, Fourth, Eighth, and Ninth Circuits. Pet. 12.[1] That is incorrect. No court of appeals has held that EAJA requires reference to national inflation data; indeed, one of the decisions that petitioner cites actually relied on *local* cost-of-living statistics. See *Dewalt* v. *Sullivan*, 963 F.2d 27, 28, 30 (3d Cir. 1992). The other cases cited by petitioner at most support the notion that the national CPI-U figure may be *a* permissible measurement of the cost of living; none of them supports the proposition that a district court abuses its discretion under EAJA by *not* employing the CPI-U, as petitioner argues. Petitioner therefore fails to identify any disagreement between courts of appeals that calls for this Court's review.

a. Three of the cases upon which petitioner relies addressed questions unrelated to whether EAJA per-

[1] Petitioner also notes (Pet. 11-12, 14) that the Court of Appeals for Veterans Claims has used a local cost-of-living measure, and asserts that the Court of Federal Claims has required the use of the national CPI-U. That is incorrect. The claims court has in fact opted to use *local* inflation figures rather than the CPI-U when put to the choice. See *Cox Constr. Co.* v. *United States*, 17 Cl. Ct. 29, 37 (1989) (rejecting "the use of national CPI figures instead of those for San Diego or Los Angeles," even though the court has nationwide jurisdiction). In any event, any conflict between or within these courts' decisions can be addressed in the first instance by the Federal Circuit, which has jurisdiction over both courts. See 28 U.S.C. 1295(a)(3), 38 U.S.C. 7292 (2000 & Supp. V 2005).

mits or requires reference to local or national inflation statistics. In *Dewalt*, the question was whether "cost of living" could permissibly be measured according to a sub-index of the CPI-U that measures only the national average change in the cost of "personal services," including legal services. See 963 F.2d at 27-28; see also *id.* at 29 ("The narrow issue presented is whether the statute permitted the district court to calculate the 'cost of living' increase solely on the basis of the personal-services component of the consumer price index."). The government argued that the statutory term "cost of living" does not mean "cost of legal services," and proposed as an alternative measure the *local* CPI-U index for southern New Jersey (*i.e.*, not the national average that petitioner urges). See *id.* at 30. The Third Circuit agreed that the "[CPI-U] index, *rather than the personal-services component of that index*, provides *an appropriate measure* of [general] inflation." *Id.* at 30 (emphases added).[2] And the court applied *not* the national CPI-U, but the *local* CPI-U for southern New Jersey. See *id.* at 28, 30.

The Third Circuit expressly agreed with the Fourth Circuit's resolution of a similar question. See *Dewalt*, 963 F.2d at 30. In *Sullivan* v. *Sullivan*, 958 F.2d 574 (4th Cir. 1992), the district court had used the "personal expenses" subcategory of the CPI-U to increase the EAJA cap. *Id.* at 575. "The sole issue on appeal [was] whether the district court abused its discretion in using the 'personal expenses' subcategory" as a measurement of "cost of living." *Id.* at 576. Looking to the text and structure of EAJA, and citing with approval the Fifth

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[2] The Third Circuit used the terms "CPI-U" and "CPI-ALL" interchangeably. See *Dewalt*, 963 F.2d at 28.

Circuit's decision in *Baker*, the Fourth Circuit held that the "personal expenses" subcategory was not a permissible measurement of the "cost of living" for EAJA purposes. See *id.* at 576-578. The court did not consider whether a national index must be used, as petitioner here would have it, or whether a local measure of inflation is permissible or even preferable.

Petitioner also quotes (Pet. 14) a single sentence from the Ninth Circuit's decision in *Thangaraja* v. *Gonzales*, 428 F.3d 870 (2005). That case, too, is inapposite, because it neither addressed nor decided whether EAJA permits or requires the use of a local or national inflation figure. First, the Ninth Circuit was awarding fees under EAJA in the first instance, not reviewing a district court's exercise of discretion to award fees. The court's statement that cost-of-living adjustments using the CPI-U are "[a]ppropriate" certainly does not purport to set the boundaries of permissible discretion. Second, *Thangaraja* relied for this proposition on an earlier case, *Sorenson* v. *Mink*, 239 F.3d 1140 (9th Cir. 2001), in which the court of appeals had held that if the CPI-U is used to measure the cost of living, then the court must use the figures for the year in which legal work is actually performed. *Id.* at 1148-1149.[3] In neither *Thangaraja* nor *Sorenson* did the court of appeals address or analyze whether a national or local measure of inflation was required or even preferable under EAJA. Accordingly, neither case's holding is in conflict with the Fifth Circuit's approach in this case. Cf.

[3] The alternative rejected in *Sorenson*—awarding attorney's fees based on the cost of living in the year a final judgment is rendered, instead of the year the underlying work was performed—was impermissible because it amounted to an unauthorized award of prejudgment interest against the government. See 239 F.3d at 1148-1149.

Sorenson, 239 F.3d at 1149 (noting that "unstated assumptions on non-litigated issues are not precedential holdings binding future decisions") (quoting *Sakamoto* v. *Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985), cert. denied, 475 U.S. 1081 (1986)).

b. Petitioner also relies on another decision that, as he admits, did not "endorse[] the CPI-U specifically." Pet. 13. In *Johnson* v. *Sullivan*, 919 F.2d 503 (1990), the Eighth Circuit considered a district court's refusal to grant *any* cost-of-living adjustment to the EAJA cap. The court of appeals held that the district court should have granted an adjustment, because Congress intended for the federal courts to take into account the cost of living in setting EAJA awards, as well as "any circumstances that would render a cost-of-living increase unjust or improper" in a particular case. *Id.* at 505.

The *amount* of the adjustment was not controverted in *Johnson*. The government "d[id] not dispute the increase in the cost of living or the method used to prove it." 919 F.2d at 504.[4] The court of appeals did observe that "[u]nder ordinary circumstances * * * the cost of living affects each litigant within a judicial district to the same degree," *id.* at 505; the appellants had noted that their counsel had received a cost-of-living adjustment for similar work from another district judge in the same judicial district, *id.* at 504.[5] The court of appeals closed

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[4] The appellants had submitted some form of CPI data to prove the increase in the cost of living; the court's opinion does not indicate whether the appellant used the CPI-U or another index, and the court noted only that the appellants' proof was "proper." *Johnson*, 919 F.2d at 504.

[5] See also *Hickey* v. *Secretary of HHS*, 923 F.2d 585, 586 (8th Cir. 1991) (remanding an EAJA award for further consideration in light of *Johnson*, "[g]iven *Johnson*'s emphasis on uniformity of hourly rates in

with the observation that "[p]roper proof of an increase in that cost of living [*i.e.*, the cost of living within a judicial district] should result in consistent hourly fee awards in each case, rather than producing disparate fee awards from each court within the district or from different districts within this circuit." *Id.* at 505. Petitioner relies heavily on the brief reference to consistency between districts, but the court's observation was at most dictum. *Johnson* did not present, and the court of appeals did not endorse, petitioner's argument that EAJA requires a nationally uniform cost-of-living standard, or that a district court necessarily abuses its discretion by applying a cost-of-living adjustment that reflects the actual conditions in the division where a case is litigated.

At most, there is tension between the Fifth and Eighth Circuits on a question petitioner does not present: whether cost-of-living adjustments must be uniform within each *judicial district*. The Fifth Circuit requires that cost-of-living adjustments generally be uniform within each *division*, *Yoes* v. *Barnhart*, 467 F.3d 426, 427 (5th Cir. 2006), while the Eighth Circuit's opinion in *Johnson* seems to endorse uniformity within each judicial district—at least to the extent that "the cost of living affects each litigant within a judicial district to the same degree," 919 F.2d at 505. Petitioner argues instead for a *national* cost-of-living measurement, which neither court of appeals has adopted.

There is no circuit conflict on the question presented that calls for resolution by this Court.

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a judicial district and that this case is also from the Eastern District of Arkansas").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2008